Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility	)	CG Docket No. 04-208
Consumer Advocates' Petition for		)
Declaratory Ruling Regarding	)	
Truth-in-Billing	)	

COMMENTS OF VERIZON WIRELESS

VERIZON WIRELESS

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SUMMARY

This proceeding offers the Commission an ideal opportunity to take the next step in crafting a national regulatory regime for wireless communications services. That regime should allow the competitive wireless market to generate benefits for consumers and the economy, while imposing only those federal rules that are necessary to correct problems competition has not solved. A national regime is critical because wireless services are increasingly sold to and used by customers on an integrated, interstate or even national basis, and because only national oversight can reach all carriers and benefit all customers.

Last November, in its *Vonage* order, the Commission preempted states from regulating most aspects of VoIP services, finding that state regulation would impede a consistent, deregulatory federal regime. It also found that VoIP was very similar to CMRS and declared that CMRS "needs national treatment on many issues." This March, echoing *Vonage,* the FCC preempted states from prohibiting or requiring line items on CMRS carrier bills and proposed to follow *Vonage* by preempting most state regulation of CMRS as well as VoIP services. The FCC should follow through on its proposal and confirm, here again, that only federal oversight can ensure that competition occurs under consistent rules that benefit all subscribers of all competitors in all states. No patchwork of state regulation can do that.

The Commission should thus take the following actions:

- Determine that a national framework is the best model for regulating billing practices of CMRS carriers because only federal rules can promote Congress's vision -- a largely deregulated, national industry that does not operate confined by individual state borders -- while providing protections deemed necessary for assisting all wireless customers in all states.

- Preempt state laws or rules that regulate the billing practices of CMRS carriers. Section 332 of the Communications Act expressly preempts some billing rules that attempt to regulate rate practices. Even though that provision does not expressly preempt the states from regulating "other terms and conditions" of CMRS, it also does not bar the FCC from finding that preemption is necessary to achieve federal objectives. The FCC has itself held that the Act grants it the <u>authority</u> to preempt state "terms and conditions" regulation. It only need find here that it <u>should</u> do so. It should find that, as with VoIP services, state regulation in fact impedes those objectives and thus must be preempted.

- Confirm, as it did in *Vonage,* that each state may enact and enforce generally applicable consumer protection laws against wireless carriers as well as other businesses operating in that state. States can and should also address consumer complaints and partner with the FCC in considering whether additional FCC intervention is needed. But states should not be permitted to impose utility-style laws or regulations aimed at CMRS providers because such regulation is antithetical to a national framework.

- Before considering new federal billing rules, collect and evaluate empirical data as to what billing-related issues the competitive market is not resolving. If the factual record shows that additional rules are needed, ensure that those rules are narrowly drawn to address the documented problem, keeping in mind the rules that are already in place, and that carriers have a clear economic incentive to ensure customers are satisfied with their bills and the services they receive.

- Any rules should be based on the comprehensive, pro-consumer provisions agreed to between the three largest wireless carriers and the Attorneys General of 32 states, known as the Assurance of Voluntary Compliance ("AVC"). The National Association of State Utility Consumer Advocates has advocated the use of that agreement as a template for any additional rules.

- Any rule preventing commingling of mandated and non-mandated line items should require wireless carriers to separate charges that they must under law collect directly from customers and remit to the government from all other charges, as the AVC provides.

- Any rule on point of sale disclosures should require wireless carriers to disclose the range of fees and charges, but should not require disclosure of the amount of each specific fee because of the wide and proliferating variation in state and local taxes, as the AVC's comprehensive point of sale disclosure requirements provide.

- Not require standardized labels for sections on carrier bills. Aside from the serious constitutional issues that mandating such commercial speech would entail, there is no evidence that standard labels would address any particular problem.

- Not require separation of regulatory fees into individual components. Such an intrusive rule would only lengthen and complicate bills; exacerbating rather than reducing any consumer confusion.

- Clarify that CMRS providers may use a line item to recover TRS fees paid to the government, because the premise on which prior FCC statements that TRS line items are not allowed applies only to landline carriers that must follow jurisdictional separations rules – rules that never applied to CMRS.

- Not expand the two remaining landline-only truth-in-billing rules to CMRS because they are not appropriate for the wireless industry.

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Verizon Wireless respectfully submits comments on the *Second Further Notice of Proposed Rulemaking* ("*Second FNPRM*")[1] in the captioned dockets. Verizon Wireless urges the Commission to establish a national framework for the uniform regulation of wireless billing practices, and if it decides that additional rules are necessary, to pattern any new requirements on the Assurance of Voluntary Compliance ("AVC") entered into between three national wireless carriers and the attorneys general of 32 states.

BACKGROUND

In its original order in the truth-in-billing docket, the FCC took certain steps to ensure that consumers would have the basic information they need to

[1] Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking,* 20 FCC Rcd 6448 (2005) ("*Second FNPRM*" or "*Second TIB Order*").

make informed choices in a competitive marketplace.[2] The FCC adopted two new rules, 47 C.F.R. § 64.2400 and 47 C.F.R. § 64.2401, to implement three principles designed to provide consumers with thorough, accurate, and understandable bills:

> First, that consumer telephone bills be clearly organized, clearly identify the service provider, and highlight any new providers;
> Second, that bills contain full and non-misleading descriptions of charges that appear therein; and,
> Third, that bills contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges, on the bill.[3]

With respect to CMRS, the FCC determined that only minimal billing rules were necessary, because "[t]he record does not, however, reflect the same high volume of customer complaints in the CMRS…context, nor does the record indicate that CMRS billing practices fail to provide consumers with the clear and non-misleading information they need to make informed choices."[4] Based on this conclusion, the FCC imposed on wireless carriers only two of Section 64.2401's requirements applicable to landline carriers -- that bills identify the name of the service provider and a toll-free number for customer inquiries -- but exempted wireless from the other requirements.[5] The FCC requested comment in 1999 on

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2 Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 7492, 7493 (1999) ("*TIB Order*" and "*TIB Further Notice*").

3 *Id.,* 14 FCC Rcd at 7496, ¶ 5.

4 *Id.*, 14 FCC Rcd at 7501-02, ¶ 16.

5 *See* 47 C.F.R. § 64.2401.

whether the truth-in-billing rules applied to wireline carriers should also apply in the wireless context.[6]

In the March 2005 *Second TIB Order,* the FCC concluded that wireless carriers should no longer be exempt from 47 C.F.R. § 64.2401(b), which requires billing descriptions to be brief, clear, non-misleading, and in plain language.[7] The Commission preempted state regulations requiring or prohibiting CMRS line items in the Declaratory Ruling portion of the *Second TIB Order*, finding that Section 332 of the Communications Act precluded such state rules.[8] The FCC also made clear, however, that nothing in the *Second TIB Order* limits states' authority to enforce their own generally applicable consumer protection laws, unless they prohibit or require line items, and that states continue to have the ability to tax and require carriers to contribute to state universal service funds.[9]

In the companion *Second FNPRM,* the FCC proposes the next step in building a national regulatory framework for billing. It seeks comment on possible new rules and the role of the states in regulatory billing.[10] The FCC tentatively concludes that one or more theories support federal preemption of state billing laws or rules that attempt to regulate billing because they would conflict with the paradigm of uniform, national regulation.[11] The Commission thus tentatively concludes that it should repeal 47 C.F.R. § 64.2400(c), which

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6 *TIB Further Notice,* 14 FCC Rcd at 7535-36, ¶¶ 68-70.
7 *Second TIB Order*, 20 FCC Rcd at 6456, ¶ 16.
8 *Id.,* 20 FCC Rcd at 6464-65, ¶ 32.
9 *Id.,* 20 FCC Rcd at 6458, ¶ 20.
10 *Second FNPRM,* 20 FCC Rcd at 6467-68, ¶ 37.
11 *Id.,* 20 FCC Rcd at 6474, ¶ 50.

permits states to enact and enforce their own "consistent" truth-in-billing regulations.[12]

Verizon Wireless urges the Commission to complete what the *Second TIB Order* began and adopt many of the *Second FNPRM*'s tentative conclusions. The FCC should establish a preemptive, national framework for the regulation of wireless billing practices because federal, not state-by-state, regulation is the right public policy for an industry that serves customers without regard to state boundaries. Verizon Wireless does not oppose a federal-state partnership in the area of billing regulation as long as that partnership leaves no room for state-by-state billing laws or rules specifically applicable to wireless carrier's billing practices. Inherently variable state regulation would undermine the clear benefits of uniform, national regulation of the wireless industry.

With respect to the specific proposals in this rulemaking related to government-mandated charges and point of sale disclosures, the Commission should ensure that any new federal rules for wireless service are narrowly drawn to address a specific problem that is sufficiently documented in the factual record. If the FCC decides to adopt additional rules, they should follow the bill format and point of sale disclosure provisions established in the AVC between 32 states and the major wireless carriers. The Commission should neither require carriers to divide federal regulatory mandates among separate line items nor dictate standard labels for categories of services, and the Commission should clarify that

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12 *Id.*, 20 FCC Rcd at 6474, ¶ 51.

CMRS carriers may recover the fees paid for the Telecommunications Relay Service ("TRS") as part of these charges. Finally, the Commission should not extend to wireless carriers its other truth-in-billing rules that today apply only to wireline carriers because those rules are not suitable for CMRS.

I. THE FCC SHOULD ADOPT A NATIONAL FRAMEWORK FOR WIRELESS BILLING PRACTICES.

There is no question that federal and not state regulation is appropriate for wireless billing practices. Wireless carriers use licenses that often span multiple states and provide national or regional price plans through standard national contracts and collateral. Wireless carriers have also devoted tremendous and ongoing investments to the creation, maintenance, and improvement of national billing, provisioning, credit, and other systems. Carriers simply cannot offer on an efficient basis the nationwide wireless services that customers want if they are forced to alter their billing systems to create state-by-state bills. The Commission should therefore exercise its legal authority to establish a comprehensive, national policy for the regulation of wireless billing practices that leaves no room for inherently disparate state-by-state regulation. Moreover, national regulation will ensure that all wireless customers in all states enjoy the same protections, which no state law or rule could do.

A. Congress Envisioned a National Wireless Market Unimpeded By Balkanized State Regulation.

Since its inception, radio-based communications technology has transcended geographic or political borders.[13] Following the introduction of wireless radio-based telephony, the FCC has consistently exercised "federal primacy over the areas of technical standards and competitive market structure for cellular service" because "state and local regulations might conflict with and thereby frustrate" [14] the federal goal of nationwide compatibility for mobile telephony.[15]

Congress amended the Communications Act in 1993 "to dramatically revise the regulation of the wireless telecommunications industry."[16] Congress preempted state regulation of CMRS rates and entry and amended section 2(b) of

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13 *See Fed. Radio Comm'n v. Nelson Bros. Bond & Mtge. Co.*, 289 U.S. 266, 279 (1933) ("No state lines divide the radio waves," such that "national regulation is not only appropriate but essential to the efficient use of radio facilities.").

14 An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Report and Order,* 86 FCC 2d 469, ¶¶ 79, 82 (1981) ("*Cellular Communications Systems*"). Indeed, the FCC noted that "we are not exercising all of the authority we have to assert federal primacy" over wireless communication. *Id.*, 86 FCC 2d at 505, ¶ 83 (discussing the importance of federal licensing and expressing confidence that states would not impede that federal policy).

15 The FCC wielded federal primacy over many aspects of wireless service long before the amendments giving it plenary authority. *See* Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, *Report and Order,* 3 FCC Rcd 7033, 7038, ¶ 35 (1988) (finding "no need to specify requirements or standards pertaining to the adequacy of cellular service" because "competition in the marketplace will assure the continued provision of high-quality cellular service.").

16 *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998); *see also* Petition of New York State Public Service Commission to Extend Rate Regulation, *Report and Order*, 10 FCC Rcd 8187, 8188, ¶¶ 2-5 (1995) ("*New York Petition*.").

the Communications Act to exclude CMRS from the general prohibition on FCC regulation of intrastate telecommunications services.[17] Section 2(b) thus exempts wireless services from the system of dual state and federal regulations that governs traditional land-based or wireline telephone services. Like other radio services, CMRS is subject to FCC jurisdiction whether it crosses state boundaries or remains in one state.

Congress determined that this broad grant of federal jurisdiction was necessary to provide a uniform regulatory framework for all CMRS offerings, which, "by their nature, operate without regard to state lines."[18] The FCC declared that, by federalizing the regulation of CMRS, Congress established a uniform "national regulatory policy for CMRS, not a policy that is balkanized state-by-state,"[19] allowing regulation only in situations where the facts

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17 *See* 47 U.S.C. § 332(c)(3)(A) ("…no State or local government shall have any authority to regulate the entry of or the rates charges by any commercial mobile service"); 47 U.S.C. 152(b) ("*Except as provided in …section 332* … nothing in this Act shall be construed to apply or to give the Commission jurisdiction … with respect to intrastate communication service.") (emphasis added).

18 H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 211, 261, *reprinted in* 1993 U.S.C.A.N.N. 378, 588 (1993) ("*First House Report*").

19 Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd 7025, 7034 (1995) (citing H.R. Rep. No. 103-213, at 480-81 (1993) ("*Connecticut Petition*").

"demonstrate a clear-cut need."[20] Congress thus appropriately recognized that "[s]tate regulation can be a barrier to the development of competition."[21]

Section 332 strictly circumscribes state authority, leaving states the possibility of regulating only "other terms and conditions" of wireless services.[22] As the legislative history of Section 332 makes clear, Congress intended to limit state regulation to neutral laws of general applicability, and only where those laws do not affect rates or entry.[23] Thus, even certain generally applicable contract or consumer protection laws may constitute preempted rate or entry regulation.[24]

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[20] Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, *Report and Order*, 10 FCC Rcd 7872, 7874, ¶ 10 (1995) ("*Hawaii Petition*").

[21] *Connecticut Petition,* 10 FCC Rcd at 7034, ¶ 14 n.44 (citing H.R. Rep. No. 103-213, at 480-481). In doing so, Congress expressed its "general preference in favor of reliance on market forces rather than regulation." *New York Petition*, 10 FCC Rcd at 8190, ¶ 18.

[22] 47 U.S.C. § 332(c)(3)(A).

[23] *See First House Report* at 261; *see also* Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order,* 14 FCC Rcd. 19898, 19903, ¶ 10 (1999) ("*SBMS*") (Congress intended a state's ability to regulate wireless services to be limited at least to the "neutral application of state contractual or consumer fraud laws.").

[24] *See* Wireless Consumers Alliance, Inc.; Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, *Memorandum Opinion and Order,* 15 FCC Rcd 17021, 17034, 17036 ¶¶ 24, 28 (2000) ("*WCA*").

The evolution of the industry is a testament to the national scope of CMRS, as "[t]oday all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of MOUs [minutes of use] to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges."[25] Wireless providers conduct their marketing, billing, and customer service operations on a regional and national basis and maintain centralized service and sales channels that transcend state boundaries.[26]

The development of today's highly competitive and national wireless industry is not accidental. It is the product of deliberate choices that were mandated by Congress and implemented by the FCC.[27] Congress, recognizing wireless technology's vast potential, made dramatic changes to the nation's telecommunications laws to foster the industry's development.[28] This national,

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25 *See* Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Ninth Report*, 19 FCC Rcd 20597, 20644, ¶ 113 (2004) ("*2004 Competition Report*").

26 For example, wireless providers maintain regional customer service centers that field calls and service customers from across the country. Many wireless providers also deploy automated interstate service channels such as Verizon Wireless's Integrated Voice Response System. The advent of the Internet has accelerated the centralization of wireless customer relations and has fostered the industry's nationwide growth in ways that are not restricted by state boundaries.

27 *Presentation of Commissioner Kevin J. Martin*, Dow Lohnes-Communications Daily Speaker Series: Wireless and Broadband: Trends and Challenges, 2004 FCC LEXIS 5871, * 9 (recognizing that "[w]ireless could develop in this manner because of a consistent regulatory treatment throughout the country") ("*Presentation of Commissioner Martin*").

28 *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) ("OBRA"); Telecomm. Act of 1996, Pub. L. No. 104-104, codified at 47 U.S.C. § 609, 110 Stat. 56, 56 (seeking "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American

deregulatory approach encourages innovation and network expansion. The "success stor[y]" of the wireless market has been attributed to the fact that the "FCC trusted the market to deliver benefits to consumers."[29] In short, the federal, deregulatory model Congress and the FCC adopted has worked.

B. State-by-State Regulation Undermines the Benefits of the Federal Deregulatory Vision for Wireless.

Even as Congress's vision for the industry has caused it to flourish,[30] in recent years states have increasingly attempted to regulate nearly every aspect of the CMRS industry. For example, New Mexico adopted interim cramming regulations that apply to wireless carriers in 1999,[31] and then followed with

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telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

[29] *Remarks of Commissioner Kathleen Q. Abernathy*, Federal Communications Bar Association Annual Meeting, 2004 FCC LEXIS 3304, *9 (June 24, 2004).

[30] According to the FCC, during 2003, the CMRS industry was marked by increased service availability, intense price competition, innovation, and a wider variety of service offerings. *2004 Competition Report,* 19 FCC Rcd at 20608, ¶ 20. To date, 276 million people, or 97 percent of the population of the United States, live in counties with access to three or more different wireless operators, and 88 percent live in counties with five or more operators. *Id.*, 19 FCC Rcd at 20608, ¶ 21. This is in dramatic contrast to the FCC's first examination of CMRS competition after the OBRA, in which it found that the wireless industry "is not the model of perfect competition." Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *First Report,* 10 FCC Rcd 8844, 8866, ¶ 65 (1995).

[31] Pursuant to the New Mexico Slamming and Cramming Act, the New Mexico Public Regulation Commission has promulgated rules that place the following obligations on all CMRS and other providers: (1) They cannot bill for non-telecommunications services; (2) They cannot change a customer's telecommunications service provider or service without either obtaining the customer's written consent or oral consent, including, in the case of oral consent, recording "the entirety of any and all communications or conversations with the

comprehensive marketing and billing rules that are in effect but are still the subject of an ongoing proceeding.[32] California adopted comprehensive rules that sought to govern nearly every aspect of CMRS service, including billing.[33] Indiana and Georgia regulated line items on bills, actions that the Commission has preempted.[34] Vermont and Louisiana have proposed rules that seek to regulate

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customer leading to such authorization"; (3) They cannot place charges for telecommunications services on a customer's bill without either obtaining the customer's written consent or oral consent, including, in the case of oral consent, recording "the entirety of any and all communications or conversations with the customer leading to such authorization." (4) They must respond to customer complaints received by telephone by the end of the next business day, and keep trying to contact the customer by telephone for the next three days. If the customer still cannot be reached by telephone, the provider must contact him or her by mail; (5) They must deliver to each customer a bill stuffer or separate mailing that explains a customer's billing rights at least two times a year; and (6) They must participate in a complaint resolution process that limits the provider's ability to collect charges while the complaint resolution process is underway and requires providers to refund the amount of any unauthorized charges within 30 days. The Commission has stayed the authorization requirements under this Act until further notice. N.M. Admin. Code tit. 17, § 13.11.2.2 (Chapter 11 "Telecommunications" of Title 17 of the N.M. Admin. Code was filed as Chapter 13).

32 This is the case despite the fact that New Mexico is a signatory to the AVC. *See* N.M. Admin. Code tit. 17, § 17.11.8.1 *et seq.* (covering among others customer complaint tracking, access the service and rate information, fair marketing practices, billing, billing disputes, customer deposits, interest on deposits, and privacy).

33 Order Instituting Rulemaking on the Commission's own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities, *Interim Decision Issuing General Order 168,* Decision 04-05-057 (May 27, 2004). The California Public Utilities Commission voted to suspend the implementation date of the rules "to prevent harm to carriers and consumers," and is currently reexamining them. Order Instituting Rulemaking on the Commission's own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities, *Order Modifying Decision 04-05-057*, Decision 05-01-058 (Jan. 27, 2005).

34 *Second TIB Order,* 20 FCC Rcd at 6463-64, ¶ 31, n.87.

wireless billing and many other practices.[35] Numerous other states have introduced legislation that would regulate the terms of wireless billing.[36]

There can be no serious dispute that national regulation, not state-by-state regulation, is the right approach to govern wireless billing practices. As an initial matter, national rules apply immediately to all 50 states and apply to each and every carrier and customer nationwide. No state law can have that impact. Even if, for example, the California Public Utilities Commission ultimately adopted rules, they would not necessarily benefit consumers in Nevada or Arizona. Only federal rules can reach all wireless carriers and assist all customers.

As Congress recognized when it federalized wireless rate and entry regulation in 1993, wireless services (unlike cable or landline telephone services) do not stop at state boundaries.[37] Individual state regulations cannot account for this fact. And, as the Commission has found, state rules can frustrate and undermine the deregulatory vision that has relied on competition, not market-distorting government intervention, to deliver benefits to consumers.[38] An open

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35 Standards for Billing, Credit and Collections, and Customer Information for Telecommunications Carriers, Vermont Public Service Board, Docket No. 6651, Proposed Sections 7.600 *et seq.* (the "VT Proposed Billing Rules"); Rulemaking to Establish Other Terms and Conditions of Mobile Service Applicable in Louisiana, Louisiana Public Service Commission, Docket No. R-28454.

36 *See, e.g., An Act Concerning Rights of Cellular Telephone Users*, Bill No. 6707, Conn. Gen . Assembly, Jan. Session (Conn. 2005); *Wireless Telephone Consumer Protection Act*, N.Y. State Assembly, S04263 (2005).

37 *First House Report* at 261.

38 *Connecticut Petition, supra* note 21. The Chairman of the Senate Commerce, Science, and Transportation Committee has also noted the need for a "national solution" to regulation that would rely on "national standards," not state-by-state rules that could interfere with the goals of the Communications Act.

market allows carriers to compete by differentiating themselves in the products and services they offer and how they communicate with customers in advertising, contracts, and bills. Regulation now being proposed in many states prevents such pro-competitive differentiation. As Commissioner Susan Kennedy stated in response to the California Public Utilities Commission's decision to adopt its consumer protection rules,

> This Commission, by injecting old-style, command and control regulation into this fiercely competitive industry and trying to "standardize" the operations of more than 200 wildly different competitors who don't employ the same technologies, sell the same products, or use the same tools to reach customers, is doing the absolutely worst thing it could for consumers.... By injecting one-size-fits-all regulation between these millions of consumers and hundreds of diverse carriers, there is a high probability that this agency will screw up the very competition that gives consumers the choices they have today. These rules will determine how the market functions - or dysfunctions.[39]

The FCC has found that the growth of national carriers has clearly benefited consumers by helping to reduce costs and enable customers to roam at progressively lower prices.[40] Economies of scale and scope have also made carriers' internal operations, such as employee training and customer billing, more efficient. In sum, "[wireless] carriers use economies of scale and scope to offer lower costs to more consumers. Their operations use uniform service plans,

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Paul Kirby, *Stevens Stresses Need for Preemption of State Regulation on Telecom Services,* TR Daily, June 6, 2005.

39 *Dissenting Opinion of Commissioner Susan P. Kennedy; Item 44a: Consumer Protection Rules*, California Public Utilities Commission, Decision 04-05-057, pp. 4-5 (May 27, 2004).

40 *2004 Competition Report,* 19 FCC Rcd at 20644, ¶ 113.

customer service training, billing systems, and 'back office' management tools. Thus, for many carriers, wireless is a more national service."[41]

Disparate state regulations drive up carriers' costs, in turn driving up the costs of service that in the end are borne by consumers.[42] State regulation undermines the economies associated with a national marketplace because carriers are required to tailor their national practices on a state-by-state basis.[43] National wireless carriers such as Verizon Wireless have invested in and achieved significant economies of scale by national standardization, including the development of various quality distribution channels, including Internet, telesales, and national retailers, and creating, training, and staffing large national call centers.[44] The development of these national offers and national standards for attracting and servicing consumers has significantly benefited consumers. These efficiencies allow carriers to serve more consumers for less cost, which drives prices lower, and this in turn attracts more consumers. Patchwork state regulation undermines these efficiencies and the pro-consumer benefits that flow

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41 *Presentation of Commissioner Martin* at *9.

42 *See* Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?,* 56 Fed. Comm. L.J. 155 (2004) ("*Hazlett*").

43 The FCC recently informed the United States Court of Appeals for the Eighth Circuit that "[t]o succeed in the marketplace, CMRS carriers typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis." Brief Amicus Curiae of the Federal Communications Commission at 11, *Cellco Partnership, d/b/a Verizon Wireless, et al., v. Mike Hatch*, (8th Cir. filed Nov. 12, 2004) (No. 04-3198).

44 Verizon Wireless is not alone. Nextel Communications, Inc. has provided evidence that it has national billing and customer service operations. *See* Letter of Christopher R. Day, Nextel, to Marlene H. Dortch, Federal Communications Commission, CG Docket No. 04-208 (Dec. 22, 2004).

from them.[45] As the author of one study evaluating the harms of state regulation concluded:

> The federal preemption of state cellular rate regulation shows that decentralized political decisionmaking did not add value for customers. Today's market, which has generated great increases in efficiency by developing six competing national networks, owes much to regulatory harmonization, suggesting that the results of a reverse experiment today would likewise underscore the deleterious effects of balkanization. As one prominent industry analyst notes, "Regulatory initiatives such as the proposed 'Bill of Rights' legislation [in California]…could have a disruptive effect on the industry." [citation omitted] It would be ironic that, after spending more than a decade piecing thousands of fragmentary cellular telephone licenses into efficient national networks, resulting efficiencies could be at least partly undone by disparate state regulatory regimes that left the industry with a patchwork of conflicting rules.[46]

In no area are the harms from disparate, state-by-state regulation more obvious than billing. Over the course of four years, Verizon Wireless invested large sums to converge 13 primary billing systems into the two such systems that it has today. Among other benefits, this has provided more accurate and timely billing across geographic areas, standardized bill formats, better customer service support, decreased "hold" times, focused training, and more effective staffing. The economies of scale from nationalized, standard billing in turn enabled Verizon Wireless to offer national rate plans at steadily lower prices. In this way, uniform billing has generated tangible benefits to consumers.

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45 *Supra* note 42.

46 *Hazlett,* 56 Fed. Comm. L.J. at 223-24.

Individualized state rules that would require carriers to create customized billing would reverse these important benefits. They would force carriers to have separate systems that are separately maintained and updated based on state boundaries, even though such boundaries are largely irrelevant to national billing systems. To adapt national business practices to comply with unique state rules entails a significant cost and effort. In some cases, costs may be so significant that they effectively prevent carriers from offering some wireless services that customers clearly want. Preemptive, national rules are thus clearly the right course for wireless billing practices.

C. The Commission Has Legal Authority to Preempt State Regulation of CMRS Billing and Point of Sale Regulation.

The Commission seeks comment on the scope of its authority to preempt state regulation of CMRS billing practices. As explained below, the Commission can preempt state regulation of wireless billing and point of sale disclosure practices on several adequate and independent grounds: (1) on a theory of express preemption, because state regulation of CMRS billing practices constitutes prohibited rate regulation under Section 332(c)(3)(A); (2) on a theory of conflict preemption, based on a determination that a balkanized system of state billing rules inherently frustrates the long-established federal objectives of uniformity and deregulation for wireless services; or (3) on a theory of field preemption, in light of the FCC's plenary authority to occupy the field of billing regulations.

1. Section 332 Preempts State Rules That Constitute Rate Regulation.

Section 332(c)(3)(A) of the Communications Act denies the states "*any* authority to regulate . . . the *rates charged by* any commercial mobile service."[47] The FCC has "interpreted the rate regulation provision of the statute to be broad in scope" and has therefore "made clear that the proscription of state rate regulation extends to regulation of 'rate levels' and 'rate structures' for CMRS."[48] The FCC confirmed the broad scope of "rate" and "rate structure" in the recent *Second TIB Order*.[49]

State action that "purports to determine the *reasonableness* of a prior rate" or "sets a prospective charge for services" likewise violates Section 332.[50] The FCC has made clear that Section 332 forbids a state from interfering with a wireless carrier's right to not only "charge whatever price it wishes,"[51] but also "determine the reasonableness of a prior rate" or "set a prospective charge for

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47 47 U.S.C. § 332(c)(3)(A) (emphasis added).

48 *Second TIB Order*, 20 FCC Rcd at 6462-63, ¶ 30. *See SBMS*, 14 FCC Rcd. at 19907, ¶ 20 ("[W]e find that the term 'rates charged' in Section 332(c)(3)(A) may include both *rate levels* and *rate structures* for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the *rate elements* for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.") (emphasis added); *see also WCA,* 15 FCC Rcd. at 17028, ¶ 13 ("At the outset of our analysis on the preemptive scope of Section 332, we observe that Section(c)(3)(A) bars state regulation of, and thus lawsuits regulating, . . . the rates or rate structures of CMRS providers.").

49 *See Second TIB Order,* 20 FCC Rcd at 6462-63, ¶ 30 ("The Commission . . . consistently has interpreted the rate regulation provision of the statute to be broad in scope.").

50 *WCA*, 15 FCC Rcd at 17041, ¶ 39 (emphasis added).

51 *Id.,* 15 FCC Rcd at 17035, ¶ 27.

services."[52] In sum, state action that, irrespective of form, demands a "reasonableness" assessment of wireless rates violates Section 332.[53]

Many state "billing" rules run afoul of Section 332's ban on "rate" regulation. For example, Vermont's proposed billing rules provide a powerful illustration as to why preemption is warranted. Vermont has proposed a billing rule that prohibits advanced payment for basic service fees more than one month in advance, while at the same time permitting carriers to offer a discount for early payment.[54] Although Vermont's proposed rule nominally governs carriers' billing practices, in reality the forced discount itself is clearly prohibited rate regulation. Moreover, this rule would restrict carriers from offering pre-paid services.[55] And by restricting pre-paid service, this proposed rule seeks to regulate CMRS rate

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[52] *Id.,* 15 FCC Rcd. At 17041, ¶ 39. *See id.*, 15 FCC Rcd at 17035, ¶ 25 (states may not make "determination[s] of whether a price charged for [wireless] service [is] unreasonable" or "set[ting] a prospective price for [wireless] service"); *Hawaii Petition*, 10 FCC Rcd at 7882 (state requirements that wireless carriers submit tariffs constitute impermissible rate regulation); *see also Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073 (7th Cir. 2004) (explaining that "state law claims are preempted where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service."); *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003); *Brown v. Baltimore/Washington Cellular, Inc.*, 109 F. Supp.2d 421, 423 (D. Md. 2000) (Section 332 preempts all claims "that involve the reasonableness …of the rates themselves.").

[53] It is beyond dispute that "judicial action can constitute state regulatory action for purposes of Section 332." *WCA,* 15 FCC Rcd at 17027, ¶ 12.

[54] VT Proposed Billing Rule § 7.618(C).

[55] Pre-paid services would only be available in the unlikely event that the carrier is somehow able to predict what the monthly service fees were going to be for a given customer. This would ensure that the carrier does not recover fees for more than a month in advance, which under the Vermont proposed rule would force the carrier to offer a discount for pre-paid services. But such a requirement would frustrate a key benefit of pre-paid for customers: flexibility on when they use their purchased air time.

structures.[56] This rule thereby conflicts with a CMRS carrier's ability to "charge whatever price it wishes" with respect to the provision of pre-paid wireless services, and it is preempted by Section 332.[57]

Other Vermont proposed billing rules also constitute "rate" regulation under Section 332. Subsection (4) provides the "right to reasonable payment terms."[58] The FCC has made clear that "states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers."[59] Vermont cannot dictate how CMRS carriers charge their customers.

Vermont Proposed Billing Rule 7.617(A)(3) would prohibit carriers from charging for roaming and other services that are not captured in billing systems until more than one billing cycle after the call is made, thus dictating how much wireless carriers can charge for these services, or in many cases prohibiting charges for these services all together. A similar issue arose in *Gatton v. T-Mobile USA, Inc.*[60] There, Plaintiffs challenged, among other things, T-Mobile's practice of allowing unused minutes in a given period to expire, rather than rolling them

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56 *See SBMS*, 14 FCC Rcd at 19907, ¶ 20.

57 *WCA*, 15 FCC Rcd at 17035, ¶ 27.

58 VT Proposed Billing Rule § 7.605(A)(4).

59 *SBMS,* 14 FCC Rcd at 19907, ¶ 20; *see also id.*, 14 FCC Rcd at 19901, ¶ 7 ("Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness *per se* of the rates or rate structures of CMRS providers.").

60 2003 WL 21530185 (C.D. Cal. 2003).

over to the subsequent period.[61] The court concluded that the challenge to this practice was preempted under Section 332, as it required the court "to assess the reasonableness of a billing factor."[62] As the court found, "The rate paid by subscribers per month is inextricably intertwined with the allocation of minutes received for payment of that rate. There is simply no reasonable way to separate Plaintiffs' challenge to the number of minutes available per month for use and the rate paid for those minutes."[63] The same analysis governs here, and compels the conclusion that Vermont Proposed Billing Rule 7.617(A)(3) is preempted.

The Commission should use the opportunity this proceeding provides to preempt such state requirements, just as it preempted state rules prohibiting or requiring line items in the *Second TIB Order*. Section 332 preserves carriers' flexibility to decide how to design their rates and to offer as many variations as customers may desire. States cannot evade the preemptive force of Section 332 by labeling rate regulation as the regulation of billing practices. The state billing rules discussed above seek to limit directly the amount charged, limit the amount charged to a "reasonableness" standard, or limit the wireless carriers' ability to structure their rates in a manner they deem fit. These attempts at rate regulation are prohibited by Section 332 and therefore are expressly preempted.

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61 *Id.* at *8.
62 *Id.*
63 *Id.*

2. State Billing Regulation Stands As An Obstacle to the Objectives of the Communications Act And Should Be Preempted.

In addition to the power to declare state regulation of billing practices expressly preempted under Section 332, the FCC also has the authority to preempt any and all state laws and regulations that conflict with the overarching goals of the Communications Act, and this is the case whether or not it adopts additional federal rules. A federal agency "'acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."[64] An "express congressional authorization to displace state law" is not required.[65] Instead, the agency must merely show that preemption is necessary to "reasonab[ly] accommodat[e] . . . [the] conflicting policies committed to the agency's care by the statute."[66] "Federal regulations have no less pre-emptive effect than federal statutes."[67] Courts have found that whenever state

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64 *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (quoting *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

65 *Id.* at 64 (quoting *Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154 (1982)).

66 *Id.* at 57 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)); *see also Hillsborough County, Fl. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985) ("[S]tate laws can be pre-empted by federal regulations as well as by federal statutes."); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 505 (1996) (Breyer, J., concurring) ("administrative agenc[ies] possess[] a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect.").

67 *Fidelity Federal Savings*, 458 U.S. at 153.

regulation would frustrate achievement of a federal regulatory objective, FCC jurisdiction is paramount and conflicting state enactments must yield.[68]

Thus, conflict preemption is warranted "when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[69] The FCC can and should exercise its conflict preemption authority with respect to state billing and point of sale regulation on the ground that state-by-state regulation of these wireless practices by its very nature does violence to the congressional goals of uniformity and deregulation for the wireless industry. For example, OBRA's stated objective, as Congress specifically explained, was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[70]

As discussed above, and as previously documented in this proceeding, various states have adopted or proposed requirements that apply to CMRS carriers that purport to add to or otherwise supplement the Commission's current

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68 *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982)*, cert. denied*, 461 U.S. 938 (1983); *accord North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977) ("*NCUC II*"); *New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977). "FCC regulations must preempt any contrary state regulations where the efficiency . . . of the national communications network is at stake . . ." *NCUC II*, 552 F.2d at 1046; *see also North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793 (4th Cir.) (state order impairing policy for connection of customer equipment with interstate network), *cert. denied*, 429 U.S. 1027 (1976).

69 *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998) (citing *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000).

70 *See OBRA*.

truth-in-billing rules.[71] Permitting the states to enact this disparate regime of billing rules will necessarily frustrate the federal goal of a vigorously competitive, national wireless marketplace. Even facially consistent regulations can impede uniformity and deregulation by the simple fact that a web of state laws will govern billing practices and be subject to inherently variable implementation, interpretation, and enforcement.

In 2004, the Commission preempted state laws attempting to regulate Voice over IP ("VoIP") on conflict preemption grounds.[72] The logic of that decision applies to wireless services as well – in fact the Commission expressly found that VoIP is "far more similar to CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues." [73]

In *Vonage,* the FCC found that state regulation "*may actually harm consumers* by impeding the development of vigorous competition."[74] For this reason, the FCC was "compelled" to preempt Minnesota Public Utilities Commission's VoIP regulations.[75] As in the VoIP context, the FCC should determine that it "cannot, and will not, risk eliminating or hampering" new CMRS

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71 *See* Letter of John T. Scott, III, Verizon Wireless, to Marlene H. Dortch, Federal Communications Commission, CG Docket No. 04-208; CC Docket No. 98-170 (Jan. 25, 2005).

72 Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion and Order,* 19 FCC Rcd 22404, 22405, ¶ 1 (2004) (emphasis in original) ("*Vonage*").

73 *Id.*, 19 FCC Rcd at 22418, ¶ 22.

74 *Id.*, 19 FCC Rcd at 22416, ¶ 20 (emphasis in original).

75 *Id.*, 19 FCC Rcd at 22412, ¶ 15.

services because such innovation "facilitates additional consumer choice, [and] spurs technological development."[76]

State regulation necessarily has this same negative impact on wireless expansion and competition, as well as on the deregulatory paradigm that Congress envisioned. Accordingly, the Commission should preempt state CMRS billing laws and rules because they stand as obstacles to achievement of Congressional and FCC policy for wireless services.

3. The FCC Has the Authority to Occupy the Field of Billing Regulation.

In addition to the legal right to find that state regulation of billing practices is conflict-preempted, the Commission also has the authority to occupy this field. As the Supreme Court has explained, a "federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."[77] Courts regularly uphold such preemption decisions where the agency has made an explicit statement and acted within its authority.[78] Thus, in order to occupy the field of wireless billing regulation, the FCC need only articulate its intent to do so.[79]

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[76] *Id.,* 19 FCC Rcd at 22427, ¶ 37.

[77] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 369.

[78] *See Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 701 (1984); *State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421, 1425 (10th Cir. 1986); *see also Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 832 (6th Cir. 1986), *cert. denied and appeal dismissed*, 484 U.S. 801 (1987); *United Steelworkers of America v. Auchter*, 763 F.2d 728, 735-36 (3d Cir. 1985); *New York State Comm'n on Cable Television v. Federal Communications Comm'n*, 749 F.2d 804, 812 (D.C. Cir. 1984).

[79] As with conflict preemption, the FCC does not need to adopt additional billing rules to preempt the field of wireless billing regulation.

The FCC's authority to regulate wireless-billing practices by occupying the field and preempting state regulation is unquestionable. As detailed above, the 1993 amendments to the Communications Act dramatically expanded the FCC's authority over wireless. But this was the case long before 1993, as Congress has always vested the FCC with plenary authority over radio services.[80] That the FCC has full authority to preempt state wireless regulation beyond rates and entry is clear from the FCC's own actions over the years – not contested by the states – to assert exclusive authority over other areas of wireless regulation, such as technical standards, even without an express direction from Congress to preempt the states in those areas.[81]

Over the past decade, asserting its plenary authority over wireless service, the FCC has carefully considered imposing a number of mandates on the industry, and has built a significant pro-consumer scheme involving detailed regulations in numerous areas. For example:

— LNP rules that allow customers who are dissatisfied with their carrier to move to another carrier and keep their number. In the first year after LNP was adopted, millions of customers ported their wireless number. The LNP rule provides consumers with the leverage to "vote with their feet" should they be dissatisfied with their carrier. This creates a tremendous incentive for carriers to be responsive to customers' desires. Experience has shown that carriers that fail to address customers' needs suffer high rates of churn that is facilitated by LNP.

– E-911 rules that require carriers to build E-911 networks, at their own expense, to transmit emergency calls to public safety agencies. [82]

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80 *Fed. Radio Comm'n,* 289 U.S. at 279 ("national regulation is not only appropriate but essential to the efficient use of radio facilities.")

81 *Cellular Communications Systems,* 86 FCC 2d at 469.

82 *See* 47 C.F.R. § 20.18.

— CPNI rules that restrict carriers from using and disclosing information about their customers' use of services.[83]

— Telemarketing rules that safeguard wireless customers against telemarketing calls to their handsets.[84]

— Coverage and build-out requirements that promote the availability of offerings in service territories.[85]

— Disabilities rules that require carriers to offer hearing-aid compatible handsets and make available services that accommodate persons with disabilities.[86]

This is by no means a comprehensive list of areas in which the FCC has established regulatory standards for CMRS, but it illustrates the point that the FCC already regulates CMRS broadly.

With respect to wireless billing regulation, in the *TIB Order,* the FCC made a compelling and unchallenged case that it has authority to ensure that telephone bills provide consumers with the information they need to make informed choices under Sections 201(b), 258, and, for CMRS, 332 of the Act.[87] With respect to Section 201(b), which requires that all carrier "charges, practices, classifications, and regulations for and in connection with" interstate communications service be just and reasonable,[88] the Commission stated that misleading and deceptive billing information is an unjust and unreasonable practice, and that

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83 *See* 47 C.F.R. § 64.2001 *et seq.*
84 *See* 47 C.F.R. § 64.1200 *et seq.*
85 *See* 47 C.F.R. §§ 22.946-.947; 22.951; 24.103; 24.203.
86 *See* 47 C.F.R. § 20.19.
87 *TIB Order,* 14 FCC Rcd at 7503, ¶ 21 n.35.
88 47 U.S.C. § 201(b).

implementation of its truth-in-billing guidelines would help deter such unreasonable practices as "cramming."[89]

Given the clear authority the Commission has to adopt rules for CMRS under Sections 201, 332, and other provisions of the Act, the Commission may lawfully preempt state regulation of CMRS billing practices on the basis of field preemption.

4. Section 332 Does Not Stand as a Bar to FCC Preemption of State Billing and Point of Sale Rules.

Section 332 does not prevent the Commission from exercising its authority under ordinary preemption doctrine. By its terms, Section 332(c)(3)(A) *expressly* preempts rate and market entry regulation. Section 332 also saves from such preemption "other terms and conditions." Thus, the states' regulation of "other terms and conditions" – to the extent that billing regulations may qualify – is not *expressly* preempted by that provision.

The "other terms and conditions language" does not, however, insulate state regulation of other terms and conditions from preemption. The FCC can and should preempt such regulation if, for example, it finds that state rules may

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89 *TIB Order,* 14 FCC Rcd at 7506, ¶ 24. The Commission also noted that Section 258 provides it broad authority to regulate the billing practices of both interstate and intrastate carriers to the extent that its regulations serve as a means to verify carrier changes. *Id.* at 7504, ¶ 22. The Commission relied on Section 332 rather than Section 258 to impose its truth-in-billing rules on wireless carriers, presumably because the Commission has exempted CMRS carriers from the verification requirements of Section 258. Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Second Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 1508, 1560 (1998) (CMRS exempt from verification requirements because slamming does not occur in the CMRS context).

frustrate Congress's desire to "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[90] This is because Section 332(c)(3)(A) preserved terms and conditions regulation only from the preemption language in that specific provision ("*this paragraph* shall not prohibit a State from regulating the other terms and conditions of [CMRS]…")[91]

In other words, Congress did not in Section 332 preserve state law concerning "other terms and conditions" from FCC preemption as a general matter. It simply provided that such laws were not *automatically* preempted under Section 332 itself, and thus would be allowed unless and until the FCC identified a particular basis for preemption. Indeed, the FCC reached precisely this conclusion in 1994, when it determined that it had "authority under *Louisiana PSC* to preempt [state] regulation" of "other terms and conditions" if it found that such regulation "thwarts or impedes our federal policy[.]"[92]

This understanding of Section 332's "other terms and conditions" language comports with the Supreme Court's acknowledgement that an agency's overarching conflict preemption authority specifically allows preemption of state

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90 *See OBRA*.

91 47 U.S.C. § 332(c)(3)(A).

92 Implementation of Section 3(n) & 332 of the Communications Act, *Second Report and Order,* 9 FCC Rcd 1411, 1506, ¶ 257 n.517 (1994).

laws "otherwise not inconsistent with federal law."[93] Also, in *Geier v. American Honda Motor Co.,* the Supreme Court conclusively established that agencies retain the right to issue preemptive rules notwithstanding a "savings clause" under standard conflict preemption principles.[94] Accordingly, under established court precedent as well as the Commission's own precedent, the "other terms and conditions" language is not a barrier to conflict preemption.

D. The FCC Should Repeal Section 64.2400(c).

The Commission seeks comment on whether it should limit the scope of what constitutes "consistent" truth-in-billing requirements under 47 C.F.R. § 64.2400(c), or whether it should eliminate that rule all together or adopt an enforcement regime where states are permitted to enforce rules developed by the FCC.[95] Because as demonstrated above a national framework for wireless billing practices is needed, the Commission should repeal Section 64.2400(c) entirely.

Section 64.2400(c) states that the Commission's truth-in-billing rules are not intended to preempt the adoption or enforcement of state consistent truth-in-billing requirements. What, however, would constitute "inconsistent" rules is left open to interpretation, inviting litigation. At what point does a similar rule

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93 *City of New York*, 486 U.S. at 64; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (savings clause in section 505(e) of the Clean Water Act providing "'[n]othing *in this section*' [of the Act] . . . shall affect an injured party's right to seek relief under state law" does not preclude agency preemption based on authority by its overarching authority to accomplish its duties under "other terms and conditions of the Act.") (emphasis in original).

94 *Geier,* 529 U.S. at 868-69.

95 *Second FNPRM,* 20 FCC Rcd at 6474, ¶ 51.

become inconsistent? As detailed above, states have adopted myriad requirements. Some are consistent with the FCC's rules, others are inconsistent, and many are in addition to the FCC's requirements.

Even if a state were to adopt provisions that were parallel to the federal rules, courts or state commissions would need to "implement" or "interpret" these rules, as the FCC frequently does. The likelihood of conflicting interpretations of similar language, either between the FCC and a state or state courts or among multiple state jurisdictions, is obvious. How could carriers ensure compliance with these rules, and even if they could, what would be the benefit of dual enforcement mechanisms? Verizon Wireless thus urges the FCC to eliminate Section 64.2400(c).

E. States Can Enforce General Consumer Protection Laws That Do Not Intrude on Areas of Regulation Committed to the FCC.

The Commission tentatively concludes that states may continue to enforce their own generally applicable contractual and consumer protection laws with respect to carriers' billing practices.[96] This kind of partnership with the states is appropriate for the wireless industry, as long as such laws do not intrude on areas of wireless regulation committed to the FCC, because it recognizes that states can play an important role in policing unlawful conduct without singling out the wireless industry by imposing wireless-specific rules.

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96 *Id.,* 20 FCC Rcd at 6475-76, ¶ 53.

All states have laws that are aimed at protecting consumers from wrongful practices by any industry. These include state unfair competition laws, deceptive trade practices, and advertising laws.[97] As the FCC has explained, Section 332 does not create "a general exemption for the CMRS industry from the *neutral application* of state contractual or consumer fraud laws."[98] Both the FCC and the courts have found that as a general matter Section 332 does not preempt claims for breach of contract and false advertising.[99] The state attorneys general therefore already have the tools under existing laws to protect their citizens when necessary and appropriate. The July 2004 AVC is an example of the use of these existing laws because it resolves claims that could have been asserted as of that time by the attorneys general of the participating states related to any state consumer protection statutes or regulations related to marketing, sales, or billing practices that the attorneys general have the authority to enforce.

The Commission can preempt state-specific wireless billing regulation while at the same time permitting states to enforce their generally applicable consumer laws. This is consistent with the *WCA* and *SBMS* cases upholding the application

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97 *See, e.g.,* Alabama Deceptive Trade Practices Act, Alabama Code 1975 § 8-19-1, *et seq.;* Arkansas Code Ann. § 4-88-101 *et seq.*; Colorado Consumer Protection Act, § 6-1-101 *et seq.*; 6 Delaware Code § 2511 *et seq.*; Georgia Fair Business Practices Act of 1975, O.C.G.A. 10-1-390 *et seq.*; Hawaii Rev. Stat. § 480-2 and § 487-5(6); Montana MCA 30-14-101 *et seq.*; Nevada Deceptive Trade Practices Act, Nevada Revised Statutes 598.0903 to 598.0999; Wisconsin Statutes §§ 100.18(1) and 100.207; and Wyoming Consumer Protection Act, Wyo. Stat. Ann. §§ 40-12-101 *et seq*. (2003).

98 *SBMS,* 14 FCC Rcd at 19903, ¶ 10 (emphasis added).

99 *See, e.g.*, *WCA*, 15 FCC Rcd at 17035, ¶ 26; *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366, 1375 (2001); *Fedor*, 355 F.3d at 1074.

to the wireless industry of state laws of general applicability barring misrepresentation and breach of contract,[100] and the FCC's *Vonage* decision.[101] In *Vonage,* the FCC declared that the Minnesota PUC's rules regulating aspects of Vonage's service were preempted as inconsistent with the uniform national regulatory framework it envisioned for IP-based services,[102] but it did not preempt Minnesota's generally applicable laws regulating consumer protection.[103]

Like the *Vonage* case, the FCC can create a national regulatory framework for regulation of CMRS billing practices without precluding a partnership between the FCC and the states in the area of wireless billing regulation by permitting the states to enforce their general contractual and consumer fraud laws. This could include a state role in handling consumer complaints and coordinating with the FCC to investigate practices. State commissions can also partner with the FCC in monitoring the structure and performance of the CMRS industry in their states and, on the basis of such data, recommend further action to be taken by the FCC.

II. IF THE FCC FINDS A NEED TO ADOPT ADDITIONAL RULES, THEY SHOULD BE BASED ON THE AVC.

The FCC proposes to adopt a number of new billing rules that would apply to the wireless industry. As the Commission has recognized in the past, however, the FCC should only impose rules on the industry if it believes that there is a

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100 *WCA,* 15 FCC Rcd at 17034, ¶ 24; *SBMS,* 14 FCC Rcd at 19903, ¶ 10.

101 *Vonage*, 19 FCC Rcd at 22405, ¶ 1.

102 *Id.* (FCC, not state commissions, has the responsibility to decide whether regulations apply to IP-enabled services, and comparable regulations must likewise yield to important federal objectives).

103 *Id.*

"clear-cut need."[104] Only empirical evidence can establish that need, not anecdotal information or conclusory assertions. In addition, the FCC has only just concluded that wireless carriers should no longer be exempt from the requirements of 47 C.F.R. § 64.2401(b), which requires billing descriptions to be brief, clear, non-misleading, and in plain language.[105] The Commission should assess the effectiveness of this and other billing rules in evaluating the need for additional regulation.

A. The Commission Must Have A Factual Record to Justify New Rules.

The administrative record must contain sufficient substantial evidence to warrant additional billing regulations. Under the Administrative Procedure Act, an agency's findings and conclusions must be supported by "substantial evidence in the administrative record."[106] An agency's "findings and conclusions will be set aside if they are 'arbitrary, capricious, an abuse of discretion' or 'unsupported by substantial evidence on the record.'"[107]

The FCC states that complaints regarding wireless billing and rates have increased significantly between 1999 when it first released the *TIB Order* and the present time.[108] The FCC acknowledges, however, that this increase might be due

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104 *Hawaii Petition,* 10 FCC Rcd at 7874, ¶ 10.

105 *Second TIB Order,* 20 FCC Rcd at 6456, ¶ 16.

106 *BFI Waste Sys. of N. Am., Inc. v. FAA*, 293 F.3d 527, 528 (D.C. Cir. 2002).

107 *Air Line Pilots Assn. v. United States DOT*, 3 F.3d 449, 453 (D.C. Cir. 1993) ("The Department's other findings and conclusions will be set aside if they are 'arbitrary, capricious, an abuse of discretion' or 'unsupported by substantial evidence on the record.'") (quoting 5 U.S.C. § 706(2)(A), (E)).

108 *Second FNPRM,* 20 FCC Rcd at 6456, ¶ 16.

in part to the significant increase in wireless subscribers since 1999.[109] The total volume of complaints is far less relevant than complaints on a proportionate, per-subscriber basis. The FCC should analyze the trend in billing complaint *rates* in considering if new rules are justified.

According to the FCC's own analysis, in fourth quarter 2002, when there were approximately 140,800,000 million subscribers,[110] there were 4,059 total wireless complaints, of which 2,598 were billing-related.[111] Two years later, wireless complaints in fourth quarter 2004 were only slightly more, at 4,369,[112] even though according to the Cellular Telecommunications & Internet Association ("CTIA"), there were 30 % more wireless customers, approximately 182,100,000.[113] And, while there were decreases in each of the top 5 categories of complaints by the end of 2004, billing and rate complaints showed an even steeper decrease.[114]

Verizon Wireless has also been tracking its own customers' complaints for the past two years, and its complaints per million customers have generally decreased. Except for the brief rise in complaints in the first quarter of 2004 largely due to the implementation of local number portability ("LNP"), customer

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109 *Id.*

110 Industry Analysis and Technology Division, FCC Wireline Competition Bureau, *Trends in Telephone Service* (rel. May 6, 2004).

111 News Release, Federal Communications Commission, *Quarterly Report on Informal Consumer Inquiries and Complaints Released* (rel. Mar. 27, 2003).

112 News Release, Federal Communications Commission, *Quarterly Report on Informal Consumer Inquiries and Complaints Released* (rel. Mar. 4, 2005) ("*4Q05 Complaint Report")*.

113 CTIA Annualized Wireless Industry Survey Results; December 1985 – December 2004, available at www.wow-com.com/research_statistics/index.cfm/AID/10030.

114 *4Q05 Complaint Report.*

complaint levels tracked at all agencies including the FCC, the state attorneys general, and the state commissions, have been falling.

Other data suggests that complaint levels are not significant. For example, Minnesota, in its efforts to justify a statute that mandated significant changes in wireless contracts,[115] could only offer a "handful" of affidavits of consumer complaints.[116] The small number of complaints paled in comparison to the millions of cellular customers within Minnesota.[117] The Eighth Circuit blocked the Minnesota statute.

Beyond the reference to some consumer complaints, the *Second TIB FNPRM* does not refer to any additional record justification to impose further regulations. The Commission cites a number of comments filed in response to the NASUCA petition, but these comments all address issues related to line-item charges, which were the subject of the *Second TIB Order*. One of the comments upon which the Commission relies for the proposition that there is considerable confusion regarding telephone bills states, in total: "Line item charges are the devil."[118] This is not the kind of empirical data that the Commission needs to

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115 Wireless providers challenged Minn. Sess. L. 2004, ch.261, art. 5. in the District Court of Minnesota and sought a preliminary injunction against the enforcement of the statute based on a number of preemption arguments. *Cellco Partnership et al. v. Hatch*, 2004 WL 1447914 (D. Minn. June 29, 2004). An appeal is pending before the Eighth Circuit Court of Appeals. *Cellco Partnership et al. v. Hatch*, No. 04-3198 (8th Cir. argued May 11, 2005).

116 Joint Reply to Appellee's Opposition to Appellants' Joint Motion for Stay Pending Appeal, *Cellco Partnership*, *supra*, at 9.

117 *Id.*

118 *See Second TIB Order,* 20 FCC Rcd at 6459-60, ¶ 24 n.65 (*citing* Comments of Jason G. Campbell).

justify new rules. The Commission has acknowledged the need for additional information when it stated that it intended "to garner as complete and up-to-date a record as possible … [and] to refresh the record on any issues from the [first] *Truth-in-Billing Further Notice*."[119]

The remarkably small number of billing complaints is a product of the vigorously competitive marketplace that has developed as a result of the Commission's implementation of Congress's national, deregulatory framework. As the Commission has explained previously, the improved competition has generated "increased service availability, lower prices for consumers, innovation, and a wider variety of service offerings."[120] In considering whether to regulate elements of CMRS, the FCC recently commented that it preferred to rely "on market forces, rather than regulation, except when there is market failure."[121] Such a competitive marketplace hardly gives rise to the kind of market failure that would support extensive regulatory intervention.

B. Any New Rules For Wireless Carriers Should Be Modeled on the Agreement Among Three National Carriers and 32 States.

To date, 32 states, through their attorneys general or state officials responsible for consumer protection, have entered into an agreement with

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119 *Second FNPRM,* 20 FCC Rcd at 6467-68, ¶ 37.

120 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eighth Report,* 18 FCC Rcd 14783, 14793 (2003).

121 *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, 8998, n.69 (¶ 22) (2002), *pet. for review denied sub. nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004).

Cingular, Sprint, and Verizon Wireless, in which these carriers agreed to follow detailed requirements for conducting their business.[122] Although all of the wireless carriers in the industry have not signed the AVC, with the merger of Sprint and Nextel, all of the national carriers except T-Mobile will be signatories. In addition, T-Mobile as well as Sprint, Cingular, Verizon Wireless, and Nextel as well as nearly 30 other carriers have agreed to comply with the CTIA Consumer Code for Wireless Service ("CTIA Code"), which requires point of sale and advertising disclosures as well as a number of other billing and marketing requirements. The industry clearly considers consumer protection an important goal, and the Commission should acknowledge these efforts as it determines whether to impose new rules.

The AVC sets forth standards for virtually all aspects of the participating carriers' interactions with customers, including the format of bills and point of sale disclosures, two of the issues on which the Commission asks for comment. The AVC:

- requires procedures to be implemented to provide to consumers during a sales transaction "clear and conspicuous" disclosures of a minimum of at least 12 separate rates and terms of service, including monthly charges for on-network, off-network, peak and off-peak charges, minimum contract term, early termination fee, service initiation fee, taxes fees and other surcharges (¶ 18)

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[122] A copy of the AVC has previously been filed in the record of this proceeding. See *Second FNPRM,* 20 FCC Rcd at 6453, ¶ 12 n.28, citing Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene F. Dortch, Federal Communications Commission, dated January 10, 2005, attaching the full document. Participating states include: AL, AR, CO, DE, GA, HI, ID, IL, IA, KS, ME, MD, MA, MI, MS, MT, NE, NV, NH, NJ, NM, NC, ND, OH, OK, OR, SD, TN, TX, VA, WI, WY. Kentucky recently became the thirty-third signatory.

- requires that bills separate taxes and surcharges that carriers are required to collect from customers and remit to the government from other monthly charges, and ensures that the carriers do not represent, expressly or by implication, that discretionary cost recovery fees are taxes (¶ 36)

The fact that the AVC was agreed to by the chief law enforcement officials of 32 states demonstrates that those states believe that the AVC sets an appropriate level of consumer protection:

- The Illinois AG stated: "These agreements mean millions of Verizon Wireless, Cingular Wireless and Sprint PCS customers will be provided with the complete and accurate information necessary to make an informed choice about which plan best suits their needs. More importantly, if consumers are not satisfied, they now have a clear exit out of a contract."

- The Tennessee AG stated: "We want Tennesseans to have all the information they need to determine which plan and wireless carrier is best for their individual needs. We are pleased that Tennesseans will have a clearer idea about the limits of wireless coverage and their wireless telephone plans."

- The Massachusetts AG stated: "Today's settlement raises the bar for all wireless carriers and provides a safety net to the growing number of cell phone users in Massachusetts and beyond."

- NASUCA issued a press release on Nov. 24, 2004 endorsing the AVC, declaring that the AVC "should serve as a template for enforceable rules throughout the country." NASUCA urged that the AVC be made national and applied to all companies.

If the FCC seeks to impose additional billing rules on the wireless industry, this can be done by adopting the relevant provisions of the AVC as express rules, as a "safe harbor," or as guidelines that would "set the bar" for determining what practices would fall below that bar and thus be presumptively unreasonable and thus subject to enforcement sanctions under Section 201 of the Communications

Act. The clear benefit would be for the FCC to set a consistent set of expectations for both carriers and consumers of this national industry.[123]

C. A Rule Preventing Commingling of Government-Mandated and Other Charges Should Track the AVC.

The Commission seeks comment on whether it should require carriers to segregate different types of line items on bills, specifically to isolate "mandated" from "non-mandated" charges. It asks whether it should define government-mandated fees to include only those that are required by the government to be collected from consumers, not including government-authorized but discretionary and all other administrative and purely discretionary charges that are not directly a result of government payments.[124] The Commission states that this is the same model as provided in the AVC.[125] It also seeks comment on a methodology based on the CTIA Code, which provides that carriers should distinguish between fees that are directly remitted to the government or its agent and those that are kept by the carrier.[126]

There are three types of charges that carriers collect from customers: (1) charges that the government requires a carrier to collect from its customers and

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[123] Rules that may be appropriate to address wireless practices would not necessarily be warranted for landline providers, or *vice versa.* The FCC has acknowledged in all of its actions in this docket that it must tailor regulation to particular problems. Some wireless practices differ from landline practices (*e.g.*, wireless customers typically execute contracts for post-paid service, while many landline carriers rely on tariffs). The FCC will need to take relevant variations into account in crafting any new rules.

[124] *Second FNPRM,* 20 FCC Rcd at 6469-70, ¶ 40.

[125] *Id.*

[126] *Id.*, 20 FCC Rcd at 6470, ¶ 41.

remit, such as a sales tax; (2) charges that the government requires carriers to remit but does not require carriers to collect from customers, such as federal universal service; and (3) charges that carriers impose on customers but that are not remitted to the government. As the Commission correctly points out, the AVC requires its signatory carriers to separate charges that the carrier is required to collect from customers and remit to the government, which are those charges that fall into the first category above, from the charges that fall into the second and third categories above.[127]

Verizon Wireless's bills contain separate sections for government-mandated charges such as the federal excise tax, state and/or local sales taxes and mandatory 911 fees, and all other charges. Verizon Wireless urges the FCC to adopt a definition of government-mandated charges that includes only those charges that are required to be collected from customers and remitted to the government, consistent with the approach taken by 32 attorneys general in the AVC.

D. The FCC Should Not Require Further Separation of Bill Sections or Standardized Labels.

The Commission seeks comment on whether it should go beyond preventing commingling of government-mandated and other charges and also require that sections on bills be further defined and segregated and follow a standard set of

[127] See AVC at 14, para. 36(a): Carriers will separate "taxes, fees, and other charges that [carriers are] required to collect directly from Consumers and remit to federal, state, or local governments…from…all other discretionary charges (including, but not limited to, Universal Service Fund fees)."

labels.[128] The Commission should reject these intrusive proposals to require separation of categories of charges beyond government-mandated and non-mandated charges,[129] as well as standardized labels.

Billing is a competitive issue, and carriers have an interest in assuring that their bills are clear and non-misleading. Carriers are always redesigning and improving their bills based on customer input to reduce confusion and customer churn. Customers who cannot understand their bills typically call carriers' customer service centers, which is costly and inefficient.[130] Regulations designating particular bill sections and the labels that should attach are unlikely to be as effective in reducing customer confusion as the input carriers receive from customers directly, and they would require carriers to make costly and unnecessary changes to their billing systems.

Carriers also bundle services differently and offer new products all the time. For instance, carriers have begun to offer innovative services such as ring tones and picture messages. Rigid regulatory requirements are unlikely to keep pace with the changing marketplace. It is unlikely that the Commission can anticipate the next new products and services that carriers will offer because the types of charges that exist today will change.

The Commission should also avoid standardized labeling because it would violate the First Amendment. The 1999 *TIB FNPRM* proposed such labeling rules

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128 *Second FNPRM,* 20 FCC Rcd at 6471-72, ¶ 45.

129 *Id.*, 20 FCC Rcd at 6471, ¶ 44.

130 According to Verizon Wireless's own data, every call to a customer service center can cost between $5 to $10.

as well, over a detailed and vigorous dissent by one commissioner.[131] Comments filed in response to the *TIB NPRM* also strongly opposed standard labels on constitutional and other grounds. The Commission wisely did not adopt standard label rules. Nothing has changed that would now allow such rules.

For the government to regulate commercial speech, it must survive the Supreme Court's four-part intermediate scrutiny analysis in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* ("*Central Hudson*").[132] Under the *Central Hudson* test, the government action must seek to regulate expression protected by the First Amendment. "For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading."[133] The next step is to "ask whether the asserted government interest is substantial."[134] If both of these inquiries yield positive answers, then the third and fourth steps are to "determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[135]

Commercial speech is expression related solely to the economic interests of the speaker and its audience.[136] For commercial speech to be protected by the

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131 *TIB FNPRM,* Dissenting Statement of Commissioner Harold Furchtgott-Roth, 14 FCC Rcd at 7569-92.

132 *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

133 *Id.*

134 *Id.*

135 *44 Liquor Mart, Inc. v. Rhode Island,* 517 U.S. 484, 500 (quoting *Central Hudson*, 447 U.S. at 566).

136 *Central Hudson,* 447 U.S. at 561.

First Amendment, it must concern a lawful activity and not be misleading.[137] Carriers seek to provide "truthful, non-deceptive information proposing a lawful commercial transaction"[138] when they create billing categories pursuant to which they charge their customers.

Once found to be protected commercial speech, under the test of *Central Hudson* a restriction on such speech may be upheld only if it "advances [a substantial government] interest[]."[139] The Commission states that its interest in requiring standardized labels is to ensure that bills are not misleading, such that consumers can make informed choices about pricing and service.[140] Yet the Commission has made no showing that the categories carriers use today are misleading, and because it would therefore make unlawful even non-misleading labels, it does not have a substantial interest. In any event, because Section 64.2401(b) now applies to all carriers and itself bans "misleading" information on bills,[141] there is no plausible need for the Commission to dictate standard labels.

The third step of *Central Hudson* requires that the speech restriction directly and materially advance the asserted government interest.[142] The regulation "may not be sustained if it provides only ineffective or remote support

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137 *Id.* at 564.
138 *Edenfield v. Fane,* 507 U.S. 761, 765 (1993).
139 *Id.*, 507 U.S. at 762.
140 *Second FNPRM*, 20 FCC Rcd at 6471-72, ¶ 45.
141 47 C.F.R. § 64.2401(b).
142 *Central Hudson,* 447 U.S. at 566.

for the government purpose."[143] Moreover, "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[144] In the instant case, standardized bill category labels would not necessarily promote the Commission's desire to provide consumers with the ability to make more informed choices because there is no factual evidence that current categories do not adequately inform or mislead consumers, or that the labels that it would choose would better accomplish this. Indeed, "[i]f the 'protections afforded commercial speech are to retain their force' [the court] cannot allow the rote invocation of the words 'potentially misleading' to supplant the [government's] burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"[145]

Finally, even assuming that the proposed regulation directly advances the asserted governmental interest, which it does not, for a standardized category label requirement to pass First Amendment scrutiny, it would also have to meet the fourth test of *Central Hudson*, which requires that the regulation be no more extensive than necessary. "The fourth step of *Central Hudson* requires a reasonable fit between the [government's] ends and the means chosen to

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143 *Edenfield,* 507 U.S. at 770 (citing *Central Hudson,* 447 U.S. at 564).
144 *Id.* at 770-71.
145 *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985)).

accomplish those ends, a means narrowly tailored to achieve the desired objective."[146] Given that "misleading" billing practices are already prohibited, an additional, more intrusive rule that would dictate the content of bills cannot meet this test.

E. A Wireless Point of Sale Disclosure Rule Should Track the AVC.

The FCC tentatively concludes that carriers must disclose the full rate, including non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale, and that disclosure of a "wide range" of surcharges would be misleading.[147] The FCC further tentatively concludes that these disclosures must occur before the customer signs a contract for service with the carriers.[148] Noting, however, that Verizon Wireless, Cingular Wireless, and Sprint PCS have agreed to provide point of sale disclosures as part of the AVC, the Commission requests comment on whether the AVC establishes an appropriate framework for point of sale disclosure rules, and whether the states should be permitted to enforce FCC rules related to point of sale disclosures.[149]

If the FCC finds empirical evidence that the competitive market is failing short of providing adequate information to consumers when they buy service, the AVC offers an appropriate way to address point of sale disclosures. The AVC provides:

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146 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001).

147 *Second FNPRM*, 20 FCC Rcd at 6476-77, ¶ 55.

148 *Id.,* 20 FCC Rcd at 6477, ¶ 56.

149 *Id.,* 20 FCC Rcd at 6477-78, ¶¶ 56-57.

> Carrier will implement procedures to provide to Consumers during a Sales Transaction clear and conspicuous disclosures of….the fact that monthly taxes, surcharges, and other fees apply, including a listing of the name or type and amount (or, if applicable, a percentage formula as of a stated effective date) of any monthly discretionary charges that are generally assessed by Carrier on Consumers in a uniform dollar amount or percentage without regard to locale. For additional monthly discretionary charges that are assessed by Carrier on Consumers with regard to locale, Carrier shall clearly and conspicuously disclose that additional monthly fees will apply, depending on the customer's locale, and disclose the full possible range of total amounts (or percentage) or the maximum possible total amount (or percentage) of such additional monthly discretionary charges.[150]

The AVC's approach makes sense because it acknowledges that carriers have two types of government-related costs: (1) those that do not vary across the carrier's footprint (*e.g.*, the federal excise tax and federal universal service), and (2) those that do vary (*e.g.*, state, county, and local charges). Specifying the exact amount or percentage is workable for the first category because these charges are consistent across all markets. That, however, is not the case for the second category, because there has been a dramatic increase in the number and variation of taxes and surcharges that local and state governments have imposed on the wireless industry.[151] To reflect the wide range of state and local taxes and fees, Verizon Wireless discloses that they may vary from six to 34 percent. The systems required to estimate any particular customer's bill are costly and complex. The

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[150] See AVC at 9, para. 18.

[151] Council on State Taxation (COST), Telecommunications Tax Task Force, *2004 State Study and Report on Telecommunications Taxation* (Mar. 2005)

AVC correctly recognizes that disclosure of a <u>range</u> of such variable government charges is appropriate. Any new FCC requirement should track this approach.

The Commission's two specific proposals for point of sale rules, in contrast to the AVC, would not be appropriate. The FCC proposes to require carriers to disclose the "full rate." Although the FCC does not define what it means by "full rate," it suggests that a "wide range" of surcharges would not suffice. This approach is fraught with ambiguity. Moreover, as explained in the previous paragraph, the plethora of varying state and local charges would make such a mandate impractical.

The Commission further proposes that the disclosure of the full rate take place *before* the customer signs a contract for service.[152] The AVC does not require this, with good reason. In addition to the fact that taxes and surcharges might vary according to the state, county, or locality, customers' bills often contain fixed fee assessments and those based on percentages of revenue generated from a subsection of the bill (*i.e.* telecommunications only), making it difficult to estimate the total amount without considering the type of service the customer purchases as well as their primary place of use. Customers must therefore select all of the features of their service and provide their addresses before Verizon Wireless can provide the customer with full rate information, and customers are hesitant to provide this personal information prior to the sales process. In addition, Verizon Wireless's point of sale systems tie to its billing systems, and to calculate a

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152 *Second FNPRM*, 20 FCC Rcd at 6477, ¶ 56.

customer's first bill, the point of sale system must have billing cycle information to establish the bill date. Billing cycle information is not available until the customer activates service, which occurs after the customer signs a contract for service. As long as disclosure occurs before the customer leaves the store, there is no reason to impose an invasive rule that carriers must provide the disclosure before the customer signs a contract. The AVC provides consumers with a 14-day grace period to terminate their contract for service without penalty, which fully protects consumers.

III. IT IS NOT UNREASONABLE FOR CMRS CARRIERS TO COMBINE FEDERAL REGULATORY CHARGES, INCLUDING TRS CONTRIBUTIONS.

The Commission seeks comment on whether it is unreasonable under Section 201(b) for carriers to combine federal regulatory charges.[153] The FCC also states that it has prohibited line items for interstate Telephone Relay Services ("TRS") costs.[154] The Commission should permit both of these practices.

A. Carriers Should Be Permitted to Combine Federal Regulatory Charges.

The FCC should not require carriers to separate the components of federal regulatory charges into individual line items. First, there is a practical problem with this concept. Often the amount attributable to a particular federal regulatory program, when divided on a per-customer, per-month basis, constitutes

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153 *Id.,* 20 FCC Rcd at 6473, ¶ 48.

154 *Second TIB Order*, 20 FCC Rcd at 6458-59, ¶ 23 n.64.

less than one cent ($0.01). For example, Verizon Wireless's federal regulatory charge today is $0.05 per customer, per month, and this includes recovery for several federal programs Billing systems do not generally permit carriers to impose charges on their customers in increments of less than one cent. If the Commission prohibited carriers from combining their federal regulatory charges, carriers would be precluded from recovery, at least on a timely basis.[155]

Second, there is no factual evidence suggesting that such an intrusive rule is needed. Those commenters that complained about line-item surcharges in the context of the NASUCA petition addressed the characterization of charges as government-mandated when they were to recover other costs. They did not address the bundling of legitimate charges. For example, National Consumers League ("NCL") stated that telephone bills are confusing because of the proliferation of charges that assess consumers more than the actual costs of government mandates.[156] Like other commenters,[157] NCL did not propose that the FCC should require unbundling of line items that recover multiple fees together, but rather focused on grouping government-mandated charges separately from other charges and making sure such charges are commensurate with the actual costs involved.[158]

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155 Carriers presumably would have to skip billing cycles until they could bill at least $0.01, which would be cumbersome.

156 Comments of the National Consumers League at 1.

157 *See, e.g.,* Comments of the Ohio Public Utilities Commission at 8; Comments of Consumers Union at 2.

158 Comments of the National Consumers League at 2.

Third, such a rule would necessarily expand the length and complexity of bills. Verizon Wireless collects for multiple federal programs, including administration of the North American numbering system and the FCC annual regulatory fees that are imposed pursuant to Section 9 of the Communications Act. Reconfiguring carriers' bills to create an individual line item for each would be expensive without any corresponding benefit.

B. Wireless Carriers Should be Permitted to Recover Costs for Interstate TRS.

With respect to the TRS component of federal regulatory charges, the Commission states that its prior orders prohibited line items for interstate TRS costs, but that it intends to revisit this issue in a separate docket.[159] Verizon Wireless urges the Commission, in this docket, to clarify that CMRS carriers may recover the costs of interstate TRS either as a separate line item or as part of federal regulatory charges that pass along wireless carriers' contributions to federal programs. The rationale that prompted the prior orders cited in the *TIB Order* applies only to landline carriers, not CMRS carriers.

The Commission has never specifically addressed how CMRS carriers are permitted to recover the costs of interstate TRS. In both its *1991 TRS Order* and its *1993 TRS Recon Order*, the Commission spoke broadly of requiring carriers to recover their interstate TRS costs as part of the cost of interstate telephone

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159 *Second FNPRM,* 20 FCC Rcd at 6459, ¶ 23, n.64; s*ee also id.*, 20 FCC Rcd at 6463-64 ¶ 31, n.86.

services.[160] Although the FCC included CMRS in the definition of a "carrier" that was required to pay TRS contributions, it never discussed CMRS in the context of barring carriers from recovering TRS contributions through a line item. To the extent that the early TRS orders offered any rationale for the line item ban, it involved jurisdictional separations. That is, carriers that are required to separate their costs are precluded from recovering costs attributed to one jurisdiction (*i.e.,* interstate) in another (*i.e.,* intrastate). CMRS carriers are not subject to the Commission's jurisdictional separations rules.[161] Therefore, the logic of the FCC's decision makes no sense except for landline providers subject to separations rules.

The issue of whether the line-item ban applied to carriers not subject to jurisdictional separations was raised on reconsideration of the *1991 TRS Order*, but the FCC never addressed the issue. GTE sought clarification as to whether its

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160 Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, *Report and Order and Request for Comments*, 6 FCC Rcd 4657, 4664, ¶ 34 (1991) ("*1991 TRS Order*") ("Moreover, in order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and not as a specifically identified charge on subscribers' lines.); Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, *Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 1802, 1806, ¶ 22 (1993) ("*1993 TRS Recon Order*") ("In order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and not as a specifically identified charge on end user's lines.").

161 The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling,* 2 FCC Rcd 2910, 2912 ¶ 18 (1987) ("Although we are not mandating a jurisdictional separations process for the cellular service unless it becomes necessary to do so, we emphasize that our jurisdiction is limited to the actual interstate cost of interconnection and ensuring that interconnection is provided for interstate service.")

service provided as a satellite common carrier was intended to fall within the scope of the new rules.[162] GTE argued that its service did not provide publicly accessible telephone voice transmission as a basic service offering. GTE noted that the *1991 TRS Order* discussed mechanisms for cost recovery of TRS services and determined that the current separations rules were adequate, while also mandating that carriers recover interstate TRS costs as part of interstate telephone services and not as a specifically identified charge on a subscribers' lines. GTE stated: "Clearly, this method of cost recovery does not apply to domestic satellite operators, as they do not operate under existing separations rules."[163] Although the FCC resolved GTE's petition for reconsideration in the *1993 TRS Recon Order*, it did not address the jurisdictional issues regarding the separations rules raised by GTE.

Subsequent decisions have not clarified the application of the TRS line-item prohibition as it applies to CMRS carriers.[164] These orders only reiterate the

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162 GTE Petition for Reconsideration/Clarification, CC Docket 90-571 (filed Sept. 3, 1991).

163 *Id.* at 4.

164 *See* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 12475, 12483, n.33 (2004) ("*2004 TRS Report and Order*") ("We take this opportunity to reiterate that carriers obligated to contribute to the Interstate TRS funds (e.g., carriers providing interstate telecommunications services) may not specifically identify a charge on their consumer's bill as one for relay services."); Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, *Third Report and Order*, 8 FCC Rcd 5300, 5305, ¶ 30 (1993) ("*TRS Third R&O*") (The FCC found that "existing accounting and separations rules should be adequate to deal with the provision of interstate TRS *by subject service providers*" but for those not subject to such separations rules, a form for reporting interstate

FCC's premise regarding the prohibition on recovery of TRS through a line item, but do nothing to explain why such a prohibition should apply to carriers that are not subject to jurisdictional separations.

If the Commission decides not to permit wireless carriers to recover the costs of TRS through a separate line item, the Commission should find that wireless carriers are still permitted to include the costs of TRS in their general federal regulatory charges as long as they do not separately state the nature of the charge. As noted above, in the *1991 TRS Order*, the FCC concluded that "carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and *not as a specifically identified charge on subscribers' lines*."[165] Similarly, in the *2004 TRS Report and Order*, the FCC stated that "carriers obligated to contribute to the Interstate TRS Fund (e.g., carriers providing interstate telecommunications services) *may not specifically identify a charge on their consumers' bill as one for relay services*."[166] Clearly, a practice of recovering TRS contributions through a generic regulatory cost line item is not specifically prohibited and is distinguishable from the practice of utilizing a line item specifically designated for TRS recovery.[167]

IV. CURRENT "WIRELINE" RULES SHOULD NOT APPLY TO WIRELESS.

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revenues should be created that is "reasonably tailored" to meet the needs of those carriers.) (emphasis added).

165 *1991 TRS Order,* 6 FCC Rcd at 4664, ¶ 34 (emphasis added).

166 *2004 TRS Report and Order,* 19 FCC Rcd at 12482, n.33.

167 The FCC has recognized as valid the practice of combining for billing purposes more than one "rate element." *See* Federal-State Joint Board on Universal Service, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952, 24979, ¶ 53 n.133.

The Commission seeks comment on whether the truth-in-billing rules that currently apply to wireline carriers should apply to CMRS.[168] The only two remaining rules that fall into this category are 47 C.F.R. §§ 64.2401(a)(2) and (c). The Commission should find that these two rules continue to be inappropriate for the wireless industry.

Section 64.2401(a)(2) requires carriers to separate charges by carrier when charges for two or more carriers appear on the same telephone bill. CMRS providers are not required to offer equal access,[169] and the Commission has made clear that wireless carriers are not required to identify all entities with which they have roaming arrangements.[170] In those situations where wireless carriers would bill for other service providers, they would either list the charges separately by carrier as required by the rule or bundle their CMRS with the other service, and the Commission has confirmed that in this circumstance, carriers are permitted to list the bundled offering on the telephone bill as a single offering, rather than listed as separate charges by provider.[171] There is to date no record of a problem for wireless consumers that could justify imposing Section 64.2401(a)(2) on the wireless industry.

Section 64.2401(c) provides that where bills contain charges for "basic local service" and other charges, they must distinguish between charges for which non-

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168 *Second FNPRM*, 20 FCC Rcd at 6467-68, ¶ 37, n.108.

169 47 U.S.C. § 332(c)(8).

170 *TIB Order,* 14 FCC Rcd at 7511, ¶ 30, n.77.

171 Truth-in-Billing and Billing Format, *Order on Reconsideration*, 15 FCC Rcd 6023, 6027 (2000).

payment will result in disconnection and those for which it will not. It remains the case that CMRS carriers do not offer "basic local service" for which disconnection is prohibited by law in the event of non-payment, and this rule should therefore not apply to wireless.

CONCLUSION

For the foregoing reasons, the FCC should advance a national framework for regulation and federalize the regulation of wireless carrier billing practices, consistent with its *Vonage* decision and its proposals in the *Second FNPRM*. If the FCC finds that additional rules are necessary, it should impose standards that do not vary from those established in the AVC. The Commission should not impose standardized labels nor require carriers to recover all federal regulatory mandates in separate line items because carriers would in essence be precluded from recovery for individual programs, and the FCC should permit CMRS carriers to recover their TRS contributions from their customers. Finally, the Commission should not extend to wireless carriers the rules that apply today only to wireline carriers.

Respectfully submitted,

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